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Supreme Court, U.S.
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No. 95-670

In The

Supreme Court of the United States

October Term, 1995

WESTECH GEAR CORPORATION,

Petitioner,

vs.

JOHN A. ANZALONE,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court For The State Of New Jersey

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Where government specifications are silent about safety devices, (i.e., neither prohibit them, nor require them), so that a contractor could have supplied them without acting "contrary" to the specifications, is a contractor which fails to provide such safety devices, entitled to invoke the "government contractor defense"?

2. To phrase the issue another way, why should a government contractor who isn't required by government specifications, to make military equipment unsafe, be excused from liability for its own negligence or defective equipment?

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STATEMENT OF THE CASE

In *Boyle v. United Technologies Corp.*, 487 U.S. 500, 108 S.Ct. 2510, 101 L.Ed. 2d 442 (1988), this Court held that in circumstances where the government specifications for military equipment required the safety defect, so that a safety device would be "contrary" to the specifications, the "government contractor defense", barred State law tort claims against a contractor failing to provide the safety device if (1) the United States approved reasonably precise specifications for the equipment, (2) the equipment conformed to those specifications, and (3) the contractor warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States. [Id. at 508, 509, 512].

At issue in the instant case however, is whether, under *Boyle*, a contractor, failing to provide safety devices, also has that defense, where the government specifications were silent about safety devices (i.e., neither required the safety defect, nor prohibited the safety devices), so that they could have been supplied without acting "contrary" to the specifications, and where the government had not exercised any "discretion" regarding such safety devices. It is the Respondent's position that in such circumstances the Contractor/Petitioner does not have the defense.[1]

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[1] (The Petitioner's contention [Pet. P. 2], that *Boyle* would allow it the defense in such circumstances is a misinterpretation of the law, since it ignores this Court's reasoning at pages 508, 509 & 512 of *Boyle*)

A. Proceedings In The Trial Court

The Respondent generally concurs with the Petitioner's Factual Statement of the Proceedings in the trial Court up to the April 30, 1993, entry of Summary Judgment in favor of the Petitioner, as set forth on pages 3 & 4 of the Petition. However, the Respondent would supplement the Petitioner's factual statements to add that the evidence before the trial Court showed that the ram tensioner is a multi-piece system, with its control station located some distance from the ram tensioner itself, on which the lower sheave pulleys were located.

The evidence before the trial Court also demonstrated that the Navy's specifications for the ram tensioner expressly invited **"alternative** (design) **proposals"**, (SHIPS-T-3945, Specification Continuation Sheets, Page 3, Para. 7) [Resp. App. 2a].

The uncontradicted evidence was also that the Navy's specifications for the ram tensioner, were silent about whether the Contractor/Petitioner should supply any safety guards, safety warnings, or chaining off of the lower sheave pulleys of the ram tensioner. The specifications neither required any safety defect, nor prohibited any safety device. This evidence further indicated that the only Navy specification discussing the design of the sheave pulley assembly, was section 3.2.6 "SHEAVES", which simply stated:

> "3.2.6 SHEAVES. – Sheaves shall be designed for one inch wire rope (breaking strength of 85,600 pounds). Means shall be provided to prevent the wire rope from jumping the sheaves." [Pet. App. 35a]

The Navy's specifications also required the Petitioner to provide "Engineering Services" to place the ram tensioner in satisfactory condition and to assist and instruct yard and ship personnel in the operation and testing of the equipment [Pet. App. 35a]. The evidence also indicated that the Navy had paid for these services.

The uncontradicted evidence also indicated that after receipt of the Navy's procurement specifications, the Petitioner, principally developed the design of the ram tensioner, and that during the course of its development, the petitioner made significant changes in the initial prototype, was responsible for testing the equipment, and for providing guidance to the Navy in the service and overall operation of the ram tensioners.

More importantly, there was no evidence that Western Gear and the Navy had any discussions or correspondence regarding the design features of the lower sheave assembly of the ram tensioner.[2] There was also no evidence of any discussions, correspondence, or specifications relating to safety devices for the lower sheave assembly of the ram tensioner, or of the placement or content, of any safety warning notices. The evidence, including admissions from the petitioner's own design engineers, also confirmed that the sheave pulleys for the ram tensioner in question, could have been guarded.

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[2] That portion of the Petitioner's statement at page 5 of its Petition, indicating that there were extensive discussions of the design of the lower sheave assembly, is not supported by the evidence presented to the Courts below and, as such, is a misstatement of the factual evidence.

After reviewing the evidence, the trial Court below made fact findings that the Navy's specifications for the ram tensioner in question, were silent about whether or not guards, warnings or chaining off were required, and that the specifications did not prohibit them. The Petitioner did not appeal from these fact findings. In spite of these findings, the trial court dismissed the Respondent's Complaint, because, in its erroneous view, by complying with the specifications, – even though the specification obligations were not "contrary" to the State law safety requirements, – the Petitioner met the requirements for the government contractor defense.

B. Proceedings Before the Superior Court of New Jersey, Appellate Division.

Respondent concurs with the Petitioner's Statement regarding these proceedings insofar as the statement goes; however, Respondent would add that the New Jersey Superior Court, Appellate Division, expressly found from the record, that "There are no specifications with respect to safety devices". It also found that the Navy did not exercise any discretion or balance any considerations with respect to safety measures". [Pet. App. 51a]. It further found that the safety defect in the ram tensioner was " . . . a defect that the government specifications had not addressed and left to WesTech's discretion" [Pet. App. 51a], that "the government ignored any safety measures" [Pet. App. 52a], and evidenced "indifference" to them [Pet. App. 53a].

C. Proceedings Before the New Jersey Supreme Court.

Respondent generally concurs with the Petitioner's Statement of such proceedings at pages 7 & 8 of its Petition, with one important exception; Respondent does not agree with the Petitioner's conclusory statement that "the other elements of the *Boyle* test had been established by the Petitioner".[3] On the contrary, the Court held that the Petitioner had not shown that the safety devices would have been "contrary" to the Navy specifications. On this issue, the Court expressly held:

> "Literally, the specifications neither required nor prohibited the inclusion of a safety feature. Thus, in this case, it does appear, in the language of *Boyle* that "the duty sought to be imposed on the contractor" – the inclusion of a safety feature on the ram tensioner – "is not identical to one assumed under the contract" or "promised the Government," nor is it "contrary to any [duty] assumed." [Pet. App. 16a]

With respect to whether the Navy exercised any discretion with respect to safety devices, the Court also found, from the record, that the Navy evinced "indifference" to safety mechanisms [Pet. App. 22a], that the omission of any safety features relating to the lower sheave assembly of the ram tensioner was not a "choice exercised by the government" [Pet. App. 22a], that the government was "not concerned with the safety aspects

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[3] The Petitioner's statement to the contrary [P. 7] is a misstatement of fact and/or law.

of the ram tensioner", and failed to "exercise[d] any discretion" with respect to safety devices. [Pet. App. 24a]

REASONS FOR THE COURT TO DENY THE PETITION FOR CERTIORARI

I. THERE IS NO "SIGNIFICANT CONFLICT" DISPLACING STATE LAW IN THIS CASE BECAUSE THE INCLUSION OF THE SAFETY DEVICES WOULD NOT BE "CONTRARY" TO GOVERNMENT SPECIFICATIONS

The principal reason that the Petition should be denied is that the New Jersey Supreme Court correctly interpreted and applied *Boyle*. It did not mischaracterize or add any new requirement, but merely applied the reasoning and criteria expressly stated by this Court in the *Boyle* case, itself.[4] It correctly held that the Contractor/Petitioner in this case, does not have the "government contractor defense" because:

> " . . . the contractor could have fulfilled its duty to the government and simultaneously complied with a state-law duty to render the product safe without infringing on the discretion exercised by the government." [Pet. App. 25a]

In *Boyle*, this Court dealt with a situation in which the government contract specifications for the helicopter

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[4] The Petitioner's statement to the contrary [Pet. P. 12, 17 & 18] is a misstatement of fact and/or law.

in question, affirmatively required the hazardous, outward opening, escape hatch. The contractor had no "**discretion**" to make it open any other direction. There was no way the contractor could have made the door safer without acting "**contrary**" to the specifications (Id. at P. 509). That fact was absolutely crucial to this court's holding and was the precise reason it distinguished its decision from an earlier case, (*Miree*), which did not displace State law. [Id. at 508, 509]. At page 509, this Court expressly stated:

> "the present case, however, is at the opposite extreme from *Miree*. Here the state imposed duty of care that is the asserted basis of the contractor's liability (specifically the duty to equip helicopters with the sort of escape hatch mechanism petitioner claims was necessary) is **precisely contrary** to the duty imposed by the government contract (the duty to manufacture and deliver helicopters with the sort of escape hatch mechanism shown by the specifications)" {Emphasis Ours}

In the instant case, unlike *Boyle*, the specifications were totally silent. They neither required the safety defect, nor prohibited any safety devices for the ram tensioner; so the Petitioner, could have provided the safety devices , without acting "**contrary**" to those specifications – but it failed to do so. Consequently, it does not have "government contractor defense".

This Court also gave an express example of when the "government contractor defense" would not apply. At page 509, this Court expressly stated:

> " . . . If for example, the United States contracts for the purchase and installation of an air-conditioning unit, specifying the cooling capacity but not the precise manner of construction, a state law imposing upon the manufacturer of such units a duty of care to include a certain safety feature would not be a duty identical to anything promised the government, but neither would it be contrary. **The contractor could comply with both its contractual obligations and the state prescribed duty of care.** No one suggests that state law would generally be preempted in this context." {Emphasis Ours}

Finally, at page 512 of *Boyle*, this Court also expressly stated:

> "it makes little sense to insulate the Government against financial liability for the judgment that a particular feature of military equipment is **'necessary'** when the Government produces the equipment itself, but not when it contracts for the production." {Emphasis Ours}

The operative word is **"necessary"**. *Boyle*, therefore, stands for the proposition that where the safety defect was "necessary", so that the safety devices **would be "contrary"** to the government specifications, the contractor can invoke the government contractor defense. In the instant case, however, the safety defect (i.e., lack of safety devices for the sheave pulleys) was not "necessary" – it was not required by the government specifications. The contractor could have provided the lacking safety devices

without acting "contrary" to the specifications. Consequently, the Petitioner is not entitled to invoke the defense. The Petitioner's interpretation of *Boyle*, would render this Court's above quoted statements, absolutely meaningless.

The record before the New Jersey Supreme Court contained clear, unappealed, trial and appellate level fact findings, that the specifications were silent about safety devices or warnings, and did not prohibit them [Pet. App. 39a, 53a]. After reviewing this record, the New Jersey Supreme Court also found that the specifications neither required nor prohibited any type of safety mechanisms or warnings on the ram tensioner in question. [Pet. App. 5a, 14a, 15a, 16a], and that the Petitioner could have included them without acting "contrary" to those specifications. [Pet. App. 5a, 15a, 25a]

In addition, as previously stated, the New Jersey Supreme Court also factually found, that the government failed to exercise any "discretion" with respect to the safety devices or warnings for the ram tensioner. The Court specifically held:

> "The record in this case, discloses that the federal government was not concerned with the safety aspects of the ram tensioner or the need for provisions for safety features in the specifications. We thus fully agree with the Appellate Division, which found that 'there is nothing in the record to indicate that the government exercised any discretion' with respect to safety devices." [Pet. App. 24a]

Since the New Jersey Supreme Court specifically concluded that the Navy's specifications did not prohibit any

safety devices or warnings for the ram tensioner, so that the contractor could have provided them without acting "contrary" to those specifications, and further, since the record conclusively indicated that the Navy failed to exercise "any discretion" or "choice" with respect to safety mechanisms for the ram tensioner, the Court correctly and accurately applied *Boyle*, in expressly finding:

> "We hold that the government specifications, according to which the ram tensioner was designed, manufactured and supplied, did not impose any requirements that would conflict with the duty of the contractor under state law to provide a product that incorporated a safety feature for the lower sheave assembly of the ram tensioner, and, hence, the government contractor defense is not applicable as a bar to defendant's liability." [Pet. App. 5a]

II. THE PETITIONER MISCHARACTERIZES THE NEW JERSEY SUPREME COURT HOLDING

The Petitioner's contention [Pet. P. 11, 12 & 22], that the New Jersey Supreme Court held that to have the defense, the Petitioner " . . . must prove that the specific defect at issue – the absence of a guard on the lower sheave assembly – was expressly required or prohibited by the Navy", is a misstatement of law, and a misinterpretation of the New Jersey Supreme Court decision. The New Jersey Supreme Court's holding is very clear. [Pet. App. 5a] It never held that "the specific defect at issue", must be "expressly required or prohibited". – That was precisely the reason for its factual finding that there was nothing in the record to indicate that the Government

exercised "any discretion" or "choice" with respect to safety devices for the ram tensioner, before deciding that there was no "government contractor defense". [Pet. App. 22a, 24a] The Petitioner has also failed to cite any statement whatsoever, in the New Jersey Supreme Court decision, indicating that it held as Petitioner claims.

The Petitioner's additional claim, [Pet. P. 11, 12], that suits in the Federal Courts in New Jersey would have a contrary outcome to those in the State Courts, because the Federal Courts would follow *Maguire v. Hughes Aircraft Corp.*, 725 F. Supp. 821 at 824 (D.N.J. 1989), Aff'd 912 F.2d 67 (3rd Cir. 1990), and that the New Jersey Supreme Court decision represents a "minority view" are also misstatements of fact and law.[5]

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[5] With respect to *Maguire* (supra), there is nothing in that case at conflict with the New Jersey Supreme Court holding in the instant case. In *Maguire*, the alleged defect (i.e., the use of the MPB bearing in the Allison Engine of a helicopter) was affirmatively **required** by the Army's design specifications themselves. The Court expressly found that the Army " . . . was responsible for the determination to use the MPB bearing in the Allison engine" (Id. 824). That fact was the very reason the defense was applied (Id. 824-825). There is absolutely no reason to believe that the Federal Courts governing New Jersey, would rule any differently from the New Jersey Supreme Court, in circumstances such as those in the instant case, where the contractor could have supplied the (lacking) safety devices without acting contrary to the specifications.

The New Jersey Supreme Court decision is not a "minority view". In fact, all Court decisions dealing with similar facts (i.e., specifications silent about safety devices, no prohibition, and no exercise of discretion regarding safety devices), have held in accordance with its decision.

The Petitioner's further contention [Pet. P. 12, 13, 14], that *Boyle* stands for the proposition that a "significant conflict" arises as a matter of law, once a contractor has complied with government specifications, even where those specifications have not considered nor prohibited safety devices, is also a misstatement of law. To the contrary, *Boyle* clearly stands for the proposition that a "significant conflict" will only exist where the provision of safety devices would be "contrary" to the government specifications. As this Court has already held in *Boyle*, a "significant conflict" would not arise if "the duty sought to be imposed on the contractor is not identical to one assumed under the contract but is also not contrary to any assumed." [Id. at 509]. This Court also pointed out in *Boyle*, that a "significant conflict" would not exist with State law, where the contractor could "comply with both its contractual obligations and the state prescribed duty of care . . . " [Ibid. at 509]

Finally, the Petitioner's claim [Pet. P. 13], that a "significant conflict" always exists, once the contractor has complied with the reasonably precise government specifications is absolutely at odds with this Court's express statement, in *Boyle* at page 512, that:

> "we are of the view that state law which holds government contractors liable for design defects in military equipment does **in some circumstances** present a 'significant conflict' with Federal policy". {Emphasis Ours}

This Court pointedly did not use the phrase "in all circumstances".

In the instant case, the government is not being "second guessed" as Petitioner claims [Pet. P. 14] with respect to the safety devices, because the record clearly indicates that the Navy didn't even consider the issue of safety devices or exercise any discretion with respect to them, in the first place.

The Petitioner's further contention [Pet. P. 14] that the New Jersey Supreme Court principally relied on two failure to warn cases, in its formulation of its opinion, is also a misstatement of fact.[6] The New Jersey Supreme Court decision, on its face, [Pet. App. 1a-25a] clearly indicates that the Court principally relied on this Court's *Boyle* decision, itself.

Petitioner's further claim [Pet. P. 15, 16] that the *In Re Joint Eastern & Southern District New York Asbestos Litigation*, 987 F.2d 626 at 632 (1990) and *Dorse v. Eagle Pitcher Industries, Inc.*, 898 F.2d 1487 (11th Cir. 1989) cases are "inapposite" because they involve failure to warn claims, is also a misstatement of law.[7]

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[6] The Court discussed the *Dorse* and *In Re Joint Eastern Asbestos Litigation* cases, only at portions of 4 pages of its 25 page decision. [Pet. App. 17a, 18a, 19a, 20a]

[7] The Petitioner's claim, in its footnote (p. 15), that the instant case does not involve a failure to warn claim, is again a misstatement of fact. The record below, including Respondent's interrogatory answers and expert report, clearly indicate that one of the Respondent's liability claims is failure to warn. – In New Jersey, the specific type of product defect does not have to be stated in the Complaint.

The Petitioner's further claim, in that footnote, that "the record below shows that a warning was placed on the ram tensioner and that the Navy controlled its contents and its

The fact that the particular safety defect involved in these two cases was lack of warnings (as opposed to another safety defect), played absolutely no part in the basis for the Courts' decisions. On the contrary, in both cases, the Courts stated their holdings in very expansive, general and broadly applicable terms, without restricting their holdings to a lack of warning situation.[8] In addition, as the New Jersey Appellate Division correctly noted, the lack of proper warnings on a potentially hazardous piece of equipment, is essentially a design defect. "They are all of a piece under the general rubric" of strict products liability, *In Re Asbestos Litigation*, (Supra), Judge Minor's concurrence. [Pet. App. 53a] See also: *Feldman v. Lederle Laboratories*, 479 A.2d 374, 97 N.J. 429, at 449 (1984).

The Petitioner's claims [Pet. P. 15, 18 & 19], that the Respondent's position has been "squarely rejected" by the 5th Circuit in *Stout v. Borg Warner Corp.*, 933 F.2d 331 (5th Cir. 1991), and that the facts in *Stout* are a "mirror image" of the instant case, are again misstatements of fact and law. On the contrary, *Stout* is clearly distinguishable

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placement" is also a misstatement of fact. – The New Jersey Superior Court, Appellate Division, expressly noted that based on the record, "there is no dispute that . . . the ram tensioner, as supplied to the Navy by WesTech, had **no safety warnings** or devices protecting the lower sheave assembly." [Pet. App. 39a] The Petitioner has submitted no specifications or other evidence to indicate that the Navy even considered warnings, much less controlled any warning, its contents or its placement.

[8] See also: *In Re Hawaii Federal Asbestos Cases*, 960 F.2d 806 (9th Cir. 1992), which broadly stated the same language and also held that safety must be "contrary" to the specifications, to have the government contractor defense. [Id. 812-813]

on the facts, and is fully consistent with the New Jersey Supreme Court holding.

In the *Stout* case, (unlike the instant case), the specifications themselves required the characteristics which made the air conditioning unit unsafe and implicitly prohibited the safety device (i.e., a wire screen over the fan condenser). In *Stout*, the uncontradicted evidence was " . . . a protective screen covering the condenser fan **would restrict** the air flow to the unit and **impair** its ability to operate effectively in extreme hot weather conditions". [Id. at 335] The evidence also indicated that a protective screen would have been **"impracticable"** and **"not feasible"** [Id. at 335]

Consequently, in *Stout*, the safety device was clearly **"contrary"** to the specifications. – In the instant case however, even the petitioner's design engineers admitted that the ram tensioner in question could have been guarded. Moreover, in *Stout*, the final design specifications were "**frozen**" and "any variation by Fairchild from the detailed design at this point would result in automatic rejection of the unit by the Army" [Id. at 333]. In the instant case, however, where "alternative (design) proposals" were permitted, there was no such prohibition [Resp. App. 1a].

The Petitioner's contentions [Pet. P. 16, 17, 19], regarding the holding in *In Re Aircraft Crash Litigation, Frederick, MD.*, 752 F. Supp. 1326 at 1338 (S.D. Ohio 1990), is a severe misstatement of the law and an attempt to mislead this Court. More specifically, the Petitioner quotes only a portion of the trial Judge's dicta indicating that he was "not convinced" the *Asbestos Litigation* and

the *Dorse* cases were correct in their interpretation of *Boyle*; and that in his view, it is not necessary to factually show that a safety device would conflict with the government specifications, in order to have the defense. The Petitioner then states that the *In Re Aircraft Crash Litigation* case was upheld, in its entirety, in an unpublished opinion; – thus leaving the false impression that the trial Court's (erroneous) view, was also upheld on appeal.

The Petitioner's partial quotation, however, pointedly omits the Court's immediately following fact finding, which completely changes the import of the Petitioner's quoted language:

> "**Even if**, however, the Second and Eleventh Circuits' view of *Boyle* is accepted, the *Asbestos Litigation* and *Dorse* cases **are distinguishable on their facts** from those at issue in the instant case. Whereas in those cases the government contractors were not prevented by their contracts from providing the warnings that Plaintiffs therein argued were called for by state law, Defendants in the instant case had **no leeway** where the content of the accident aircraft's manuals was concerned, as the following uncontroverted facts demonstrate." [Id. at 1365] {Emphasis Ours}

Had the Petitioner disclosed this additional portion of the quotation, of which Petitioner was well aware, it would have been clear that the actual basis for the trial Court's decision to apply the "government contractor defense", was because the contractors had **"no leeway"** to deviate from the defective language of the aircraft manuals. Consequently, the safety defect was required and the case

was appropriately upheld. The Petitioner's misleading, partial quotation clearly seeks to create the false impression that this fact was not the basis of the Court's decision.

The Petitioner again misstates the holding of the New Jersey Supreme Court [Pet. P. 17, 18 & 19], as requiring a contractor, in every case, to prove that the government considered the safety aspects of a particular design, and to show that there was discourse regarding the specific design deficiency or safety features, in order to have the defense. – This is simply not true [Pet. App. 22a, 24a]. All the New Jersey Supreme Court holding stands for, in this aspect, is that in those situations where the specifications do not, explicitly or implicitly, prohibit a safety device, so that a contractor would presumably not have the government contractor defense, a contractor can still invoke the defense, if it can show that the government exercised discretion with respect to such safety devices.

The Petitioner's claim [Pet. P. 18], that the facts of the instant case are not distinguishable from *Boyle*, is also a clear misstatement of fact. In *Boyle*, as previously discussed, the safety defect was affirmatively required by the specifications, so the contractor **could not** provide safety devices without acting **"contrary"** to them. In the instant case, nothing in the specifications required the safety defect and the contractor **could have provided** the safety device **without acting "contrary"** to the specifications.

III. THE CASES OF *SMITH V. XEROX CORPORATION, HARDUVEL V. GENERAL DYNAMICS CORP., NICHOLSON V. UNITED TECHNOLOGIES CORP.* AND *WILSON V. BOEING CO.* (CITED BY PETITIONER) DO NOT, IN FACT, SUPPORT PETITIONER'S POSITION.

The Petitioner cites the cases of *Smith v. Xerox Corporation*, 866 F.2d 135 (5th Cir. 1989), *Harduvel v. General Dynamics Corp.*, 878 F.2d 1311 at 1318-1321 (11th Cir. 1989), *Nicholson v. United Technologies Corp.*, 697 F. Supp. 598 at 604 (D.Conn. 1988), and *Wilson v. Boeing Co.*, 655 F. Supp. 766, 773 (E.D. Pa. 1987), [Pet. P. 19, 20, 21], as supporting its essential contention, that compliance with government specifications entitles it to the defense, even if the missing safety devices were not "contrary" to the specifications. – In fact, however, they do not.[9] In *Smith, Harduvel* and *Nicholson*, the safety defects were all affirmatively required by the specifications, themselves (unlike the instant case). Consequently, they appropriately applied the government contractor defense. The *Wilson* case (to be discussed *Infra*), is absolutely bad law and has no legal validity, at all.

In *Smith* (Supra), the alleged defect causing the injury (i.e., the inadequate waterproofing design) was affirmatively required by the Government specifications themselves.[10] These specifications dictated the specific

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[9] The Petitioner's contentions regarding these cases [Pet. P. 19, 20, 21], are misstatements of fact and law.

[10] The Petitioner's claim [Pet. P. 20], that the *Smith* Court did not address whether waterproofing procedures were affirmatively required by the specifications, is a misstatement of fact.

environmental criteria that the government wanted the Viper Weapons Simulator to meet in terms of temperature, humidity and salt resistance. [Id. at 138]. The specifications were not silent about such criteria. Moreover, this very fact, the requirement for the defect, was the exact basis for the Court's decision to apply the "government contractor defense". At page 138 the Court expressly held:

> "**Because** the government, in this case **supplied** the relevant environmental specifications it **wanted the Viper to meet**, which **were incorporated** into Xerox's production contract . . . **We find** that Xerox has satisfied its burden of proof in this issue." [Id. at 138] {Emphasis Ours}

Similarly, in *Harduvel V. General Dynamics Corp.*, (Supra), the safety defect, (i.e., the layout of the F16 wiring system) was again affirmatively required by the specifications themselves. The contractor was not free to change that wiring layout without acting "contrary" to the government specifications. The Court found the wiring chafing problem to be **"inherent"** in the required design of all electric F16's. [Id. at 1317, 1318] The dictionary definition of the word "inherent" is "necessary" or "essential".

Again, in *Nicholson v. United Technologies Corp.* (supra), the safety defect, (i.e., the incorrect language in a helicopter repair manual), was specifically and affirmatively required by the government's specifications themselves.[11] The specifications were not silent about the

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[11] The Petitioner's statement to the contrary [Pet. P. 11, 20 & 21] is a misstatement of fact and/or law.

language to be used. At page 604 the Court expressly found that the government set forth the exact contents of the manual, maintained control of the contents of the manual and made changes in it as it saw fit without any input from the printing contractor whatsoever. The printer was "obligated" by the government specifications to print the manual exactly as furnished by the government, without the authority to make any changes. These facts were crucial to the Court's decision, which expressly held:

> "A contractor should not be held liable for deficiencies in the contents of a maintenance manual if the contents were **dictated** by the Government." [Id. at 604] {Emphasis Ours}

Finally, the *Wilson* case (Supra), has no applicability whatsoever. It is a trial level decision, decided in 1987, the year **before** this Court's 1988 *Boyle* decision. Moreover, it is expressly based on an even older, 1985, Circuit Court decision in *Koutsoubos v. Boeing-Vertol*, 755 F.2d 352 (3rd Cir. 1985), cert. denied, ___ U.S. ___ 106, S.Ct. 72, 88 L.Ed.2d 59 (1985) [Id. at 771-772]. It does not address, interpret or apply the *Boyle* case at all.

PETITIONER'S MISSTATEMENTS OF FACT AND/OR LAW

The Petitioner's misstatements of Fact and/or Law at pages 2, 5, 7, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, and 22 of its Petition, have been specifically indicated and expressly referred to as such, previously in this Brief and

are incorporated herein. In the interest of brevity, however, they are not being separately or expressly restated here.

CONCLUSION

For the above reasons, I respectfully request this Honorable Court to deny the Petition for Certiorari on the merits.

Respectfully submitted,

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SCHEDULE – REQUEST FOR PROPOSALS AND PROPOSAL CONTINUATION SHEET – DD746-1

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NOTICE TO OFFERORS (continued)

6. Purchased Materials: [ ] If box is checked, Offerors shall furnish the following information with their proposals:

   (a) Principal materials or components to be purchased by the Offeror;

   (b) Proposed or established sources, including size classification (large or small business) of each source;

   (c) Proposed method of purchase (whether competitive or other than competitive) and reasons therefor;

   (d) Basis for award; i.e. low bidder or delivery, etc.;

   (e) Copies of suppliers' cost breakdowns and any price analysis made by the contractor if non-competitive;

   (f) Type of pricing arrangement;

   (g) Comparison with invoice prices of prior procurements, if any;

   (h) Organizational relationship, if any, of proposed supplier to Offeror; and

(i) In the circumstance of follow-on orders, an explanation of any changes in "make-or-buy" decisions substantially affecting the proposed price or creating diversification for the contractor at the expense of the Government.

7. Alternative Proposals: Alternative proposals may also be submitted provided that all deviations are clearly specified.

INSTRUCTIONS TO OFFERORS REGARDING SUBMISSION OF PROPOSALS

1. Close of Business: For the purpose of receiving proposals, the close of business of this establishment is 4:30 P.M. Eastern Standard Time.

2. Telegraphic Proposals: Telegraphic proposals will not be considered although proposals may be modified by telegraphic notice – provided such notice is *received* prior to the time set for the receipt of proposals.

3. Envelope for Proposals: It is important that proposals be mailed in the envelope provided for that purpose. Failure to do so may result in premature disclosure of your proposal. Envelopes must not be used for *forwarding anything other than proposals,* e.g., "No bid", etc.

4. Hand-Carried Proposals: Hand-carried proposals shall be personally deposited by carrier in bid box in Room . . . "N" Building, Located in rear of Main Navy Building, 16th Street and Constitution Avenue, N.W.

5. Wage Determinations: Your attention is directed to the possibility that wage determinations may have been . . .